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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

UNITED STATES OF AMERICA,
Petitioner,

v.

ST. LOUIS DAIRY COMPANY,
Respondent.

BRIEF

Of Respondent, St. Louis Dairy Company, in Opposition to Petition for Writ of Certiorari.

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INDEX.

	Page
Opinions below and jurisdiction	1
Questions presented	1
Statement	2
Summary of the argument	9
Argument	17
I. Certiorari does not issue to review evidence or inferences drawn from it	17
II. There is no conflict with the Supreme Court or among the Circuits as to the rule applied by the Court of Appeals below that respondent's motions for acquittal should have been sustained for the reason that there was no substantial evidence, considered in the light most favorable to the Government, to support the conviction	19
1. The Court of Appeals applied the controlling substantial evidence rule, and did not weigh the evidence as erroneously claimed by petitioner	19
2. In determining the sufficiency of the circumstantial evidence, upon which the Government relied exclusively, the Court of Appeals was entitled to pass upon the reasonableness of the inferences to be drawn from the circumstances proven, and properly held that the motion of acquittal should have been sustained in the absence of reasonable inferences supporting the conviction to the exclusion of the hypothesis of respondent's innocence	20

3. Applying the above rule to the case at bar, the Appellate Court was justified in holding that there was no substantial evidence of respondent's guilt, considering the proven circumstances in a light most favorable to the Government 26

III. The Appellate Court properly held that the judgment of the District Court should be reversed because of prejudicial evidence received over objections of respondent, and the District Court erred in not striking that evidence from the record 45

IV. The Appellate Court did not hold, as suggested by petitioner, that (A) the Statute of Limitations applied to the case at bar, nor that (B) the jury's verdicts of conviction were discredited by the verdicts of acquittal..... 52

Conclusion 54

Cases Cited.

Abrams v. United States (1919), 250 U. S. 616, 619, 63 L. Ed. 1173, 1176, 40 S. Ct. 17.....9, 18

American Tobacco Co. v. United States (C. C. A. 6, 1944), 147 F. 2d 93, 101, aff. (1946) 328 U. S. 781, 90 L. Ed. 1575, 66 S. Ct. 1126.....10, 13, 14, 22, 29, 36

Appalachian Electric Power Co. v. N. L. R. B. (C. C. A. 4), 1938), 93 F. 2d 985, 989.....10, 23

Arnall Mills v. Smallwood (C. C. A. 5, 1933), 68 F. 2d 57, 59 .....14, 43

Beck v. United States (C. C. A. 8, 1929), 33 F. 2d 107, 112 .....10, 25

Bishop v. United States (C. C. A. 8, 1926), 16 F. 2d 410, 416-7 .....10, 25

Braatelien et al. v. United States (C. C. A. 8, 1945), 147 F. 2d 888, 892.....15, 50

Cady v. United States (C. C. A. D. C., 1923), 293 F. 829 ..... 10, 26
Cartello v. United States (C. C. A. 8, 1937), 93 F. 2d 412, 415 ..... 14, 42
Cement Mfrs. Protective Ass'n v. United States (1925), 268 U. S. 588, 69 L. Ed. 1104 ..... 13, 32
Chicago & N. W. R. Co. v. Ohle (1886), 117 U. S. 123, 129, 29 L. Ed. 837, 839, 6 S. Ct. 632 ..... 9, 18
Coen v. American Surety Co. of N. Y. (C. C. A. 8, 1941), 120 F. 2d 393, 400, cert. den. 314 U. S. 667, 86 L. Ed. 534, 62 S. Ct. 128 ..... 16, 53
Commonwealth v. Giles, 1 Gray (Mass.) 466 ..... 15, 51
Consolidated Edison v. Columbian Enameling & Stamping Co., 306 U. S. 292, 300, 83 L. Ed. 660, 59 S. Ct. 501 10
Cravens v. United States (C. C. A. 8, 1932), 62 F. 2d 261, 274 ..... 10, 25
Curley v. United States (C. A. D. C., 1947), 160 F. 2d 229, cert. den. 331 U. S. 837 ..... 10, 21
Davis v. United States (C. C. A. 6, 1901), 107 F. 753, 755 ..... 14, 39
Dickerson v. United States (C. C. A. 8, 1927), 18 F. 2d 887, 893 ..... 10, 23
Eastern Coal Corp. v. N. L. R. B. (C. C. A. 4, 1949), 176 F. 2d 131, 136 ..... 10, 23
Edwards v. United States (C. C. A. 8, 1925, 7 F. 2d 357, 360 ..... 10, 25
Estep v. United States (C. C. A. 10, 1943), 140 F. 2d 40, 45 ..... 10, 23
Ezzard v. United States (C. C. A. 8, 1925), 7 F. 2d 808, 811 ..... 14, 43
Federal Trade Commission v. The Cement Institute et al. (1948), 333 U. S. 683, 708, 92 L. Ed. 1010 .... 13, 32
Foran et al. v. Commissioner (C. C. A. 5, 1948), 165 F. 2d 705, 707 ..... 14, 44

Gargotta v. United States (C. C. A. 8, 1935), 77 F. 2d 977, 981 ..... 10, 25
General Talking Pictures v. Western Electric Company (1938), 304 U. S. 175, 82 L. Ed. 1273, 1275... 9, 17
Gold v. United States (C. C. A. 8, 1929), 36 F. 2d 16, 32 ..... 10, 25
Graceffo v. United States (C. C. A. 3, 1931), 46 F. 2d 852, 853 ..... 10, 25
Grant et al. v. United States (C. C. A. 3, 1931), 49 F. 2d 118, 119-120 ..... 11, 25
Grantello v. United States (C. C. A. 8, 1924), 3 F. 2d 117, 118 ..... 11, 25

Hammond v. United States (C. A. D. C., 1942), 75 U. S. App. D. C. 395, 127 F. 2d 752, 753..... 11, 26
Heard v. United States (C. C. A. 8, 1919), 255 F. 829, 832 ..... 14, 43
Howell Turpentine Co. v. Commissioner (C. C. A. 5, 1947), 162 F. 2d 319, 325..... 14, 44

Jacobson v. Hahn et al. (C. C. A. 2, 1937), 88 F. 2d 433 ..... 15, 43

Karchner v. United States (C. C. A. 7, 1932), 61 F. 2d 623 ..... 11, 26
Kettenbach v. United States (C. C. A. 9, 1913), 202 F. 377, 383..... 15, 51

Lancaster v. Collins (1885), 115 U. S. 222, 225, 29 L. Ed. 373, 374, 6 S. Ct. 33..... 9, 18
Lilienthal's Tobacco v. United States (1878), 97 U. S. 237, 266, 24 L. Ed. 901, 905..... 14, 40

McClintock v. United States (C. C. A. 10, 1932), 60 F. 2d 839, 842 ..... 11, 26
McLaughlin v. United States (C. C. A. 3, 1928), 26 F. 2d 1, 3 ..... 11, 25
Mortensen v. United States (1944), 322 U. S. 369, 374, 88 L. Ed. 1331, 1335, 64 S. Ct. 1037..... 9, 18

National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U. S. 292, 300, 83 L. Ed. 660, 59 S. Ct. 501 23
Nicola v. United States (C. C. A. 3, 1934), 72 F. 2d 780, 786 ..... 11, 25
Nosowitz v. United States (C. C. A. 2, 1922), 282 F. 575, 578 ..... 11, 25
O'Hara v. Lamb Construction Co. (Mo. App., 1917), 197 S. W. 163, 165 ..... 15, 48
Parnell v. United States (C. C. A. 10, 1933 on rehearing), 64 F. 2d 324, 329 ..... 11, 26
Peightel v. United States (C. C. A. 8, 1931), 49 F. 2d 235, 240 ..... 11, 23
Pennsylvania R. R. Co. v. Chamberlain (1933), 288 U. S. 333, 340-1, 77 L. Ed. 819, 823, 53 S. Ct. 391 .. 15, 44
People v. Altice Case (1922), 222 Mich. 379, 190 N. W. 289 ..... 16, 53
Peters v. United States (C. C. A. 8, 1947), 160 F. 2d 319, 320, cert. den. 331 U. S. 825, 91 L. Ed. 1840, 67 S. Ct. 1316 ..... 11, 21
Read v. United States (C. C. A. 8, 1930), 42 F. 2d 636 ..... 11, 25
Ridenour v. United States (C. C. A. 3, 1926), 14 F. 2d 888, 892-3 ..... 11, 25
Romano v. United States (C. C. A. 2, 1925), 9 F. 2d 522, 524 ..... 11, 25
Roukous v. United States (C. C. A. 1, 1912), 195 F. 353, 361, cert. den. 225 U. S. 710, 56 L. Ed. 1267, 32 S. Ct. 840 ..... 11, 25
Salinger v. United States (C. C. A. 8, 1927), 23 F. 2d 48, 52 ..... 11, 25
Schad v. 20th Century Fox-Film Corp. (C. C. A. 3, 1943), 136 F. 2d 991, 996 ..... 11, 23
Scott v. United States (C. C. A. 10, 1944), 145 F. 2d 405, 408, cert. den. 323 U. S. 801, 89 L. Ed. 639, 65 S. Ct. 561 ..... 12, 23

Spalitto v. United States (C. C. A. 8, 1930), 39 F. 2d 782, 784 ..... 12, 25
Sullivan v. United States (C. C. A. 8, 1922), 283 F. 865, 868 ..... 12, 25
Tatt v. Commissioner (C. C. A. 5, 1948), 166 F. 2d 697, 699 ..... 15, 44
Texas Co. v. Hood et al. (C. C. A. 5, 1947), 161 F. 2d 618, 620, cert. den. 332 U. S. 829, 92 L. Ed. 403, 68 S. Ct. 206 ..... 15, 43
Tingle v. United States (C. C. A. 8, 1930), 38 F. 2d 573, 575 ..... 12, 23
Troxell v. Delaware, Lackawanna & Western R. Co. (1913), 227 U. S. 434, 442, 57 L. Ed. 586, 590, 33 S. Ct. 274 ..... 9, 18
Turinetti v. United States (C. C. A. 8, 1924), 2 F. 2d 15, 17 ..... 12, 23
Union Electric Light & Power Co. v. Snyder Estate Co. et al. (C. C. A. 8, 1933), 65 F. 2d 297, 302-303 ..... 15, 46, 47, 51
Union Pacific Coal Company v. United States (C. C. A. 8, 1909), 173 F. 737, 740 ..... 12, 24
United States v. Adams Express Co. (D. C. Iowa, 1902), 119 F. 240, 242 ..... 15, 51
United States v. Gasomiser Corporation (D. C. Dela., 1947, reh. den. 1948), 7 F. R. D. 712 ..... 12, 24
United States v. Gouled (D. C. N. Y. 1918), 253 F. 239 ..... 15, 51
United States v. International Harvester Co. (1927), 274 U. S. 693, 708-9, 71 L. Ed. 1302 ..... 13, 34
United States v. Laffman (C. C. A. 3, 1945), 152 F. 2d 393, 394 ..... 12, 23
United States v. Litberg (C. C. A. 7, 1949), 175 F. 2d 20, 21 ..... 12, 22
United States v. Pierce (D. C. N. Y. 1917), 245 F. 888, 890 ..... 15, 51

United States v. Socony-Vacuum Oil Co. (1940), 310 U. S. 150, 254, 84 L. Ed. 1129, 1184, 60 S. Ct. 869 ..... 9, 15, 18, 47
United States v. Standard Oil Company of New Jersey (D. C. E. D. Mo., 1931), 47 F. 2d 288, 316-317 ..... 14, 34, 36
United States v. Sugar Institute (D. C. N. Y., 1934), 15 F. S. 817, 887 ..... 14, 33
United States v. Valenti (C. C. A. 2, 1943), 134 F. 2d 362 ..... 12, 21
VanGorder v. United States (C. C. A. 8, 1927), 21 F. 2d 939, 942 ..... 12, 25
Watson v. St. Louis, I. M. & S. R. R. Co. (C. C. Ark. 1909), 169 F. 942, 945, aff. 223 U. S. 745, 56 L. Ed. 639, 32 S. Ct. 533 ..... 16, 53
Wesson v. United States (C. C. A. 8, 1949), 172 F. 2d 931, 933 ..... 12, 25
Wiener v. United States (C. C. A. 3, 1922), 282 F. 799, 801 ..... 12, 25
Willsman et al. v. United States (C. C. A. 8, 1923), 286 F. 852, 856-7 ..... 12, 25
Winn v. Consolidated Coach Corp. (C. C. A. 6, 1933), 65 F. 2d 256, 257 ..... 15, 44
Yellow Cab Co. of Philadelphia v. Rodgers (C. C. A. 3, 1932), 61 F. 2d 729 ..... 15, 43
Yoffe v. United States (C. C. A. 1, 1946), 153 F. 2d 570 ..... 12, 21, 22
Young v. United States (C. C. A. 5, 1938), 97 F. 2d 200, 202, reh. den. 97 F. 2d 1023 ..... 15, 43
Yusem v. United States (C. C. A. 3, 1925), 8 F. 2d 6, 8 ..... 12, 25

No. 593.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

UNITED STATES OF AMERICA,
Petitioner,

v.

ST. LOUIS DAIRY COMPANY,
Respondent.

BRIEF

Of Respondent, St. Louis Dairy Company, in Opposition to Petition for Writ of Certiorari.

OPINIONS BELOW AND JURISDICTION.

The data set out and statements made by petitioner in its brief, pages 1 and 2 under the above headings, are correct and concurred in by this respondent.

QUESTIONS PRESENTED.

Actually only two questions are presented by the petitioner.

1. Whether there was substantial evidence to justify the District Court in overruling respondent's motions for a

verdict of acquittal at the close of the Government's case, at the close of all the evidence, and for a judgment of acquittal or, in the alternative, for a new trial, after verdict and judgment were rendered against respondent.

2. Whether the admission of evidence as to the foreign control of respondent and as to the compensation of individual defendants constituted reversible error.

Question No. 1 rephrases what petitioner has set out in different and rather inaccurate language as its Questions 1 and 2. Petitioner's Question 4 is identical with Question 2 above. Petitioner's Question No. 3 is irrelevant and unnecessary.

STATEMENT.

Petitioner's description of the proceedings below is correct. For the purpose of completeness it may be added that separate motions for judgment of acquittal were filed by respondent at the close of the Government's case, at the close of all the evidence, and, after verdict, for judgment of acquittal or in the alternative for new trial. They all were overruled by the District Court (R. 287-293, 571-578, 631-637).

The Government charged a conspiracy among two dairies and some of their officers to fix retail and wholesale milk prices of Grade A regular milk in the St. Louis area, for the ten-year period prior to the return of the indictment on February 15, 1948 (R. 4-10, 22-25, 62). The two dairies (or handlers, as they are sometimes referred to) are the St. Louis Dairy Company and the Pevely Dairy Company, the two largest milk distributors in the area. The individual defendants were the president of respondent, Basil M. Lide, and the five Kerckhoff brothers who were, respectively, president and directors of Pevely Dairy.

All the defendants were tried together. The jury acquitted all individual defendants, but found the corporations guilty. On appeal the convictions were reversed. Petitioner rested its case on circumstantial evidence alone, and admitted that it had no direct evidence of any express oral or written conspiratorial agreement by or between any of the defendants (R. 22 and 71). The Government contended that "an oral agreement" could be "implied" from circumstantial evidence consisting primarily of uniform price changes made effective by both corporate defendants within short spaces of time of each other, and from certain conversations between the two sales managers of the corporate defendants, Gee and Wasser, in the period from August 7, 1939, through August 28, 1941.

Both Gee and Wasser were called as government witnesses and unequivocally denied the existence of any conspiratorial agreement (R. 256, 229). They testified positively concerning the economic necessity for each of the price changes involved, and their testimony on both points was fully supported by the testimony of other defendants' witnesses.

There is no conflict in the evidence relating to the cost factors involved in the marketing of milk and concerning the circumstances—all beyond defendants' control—which make the milk a uniform product. The price of raw milk is determined and fixed pursuant to government orders and regulations, stemming from the Agricultural Marketing Agreement Act of 1937 as amended (Act of June 3, 1937, c. 296, 50 Stat. 249, 7 U. S. C. A. 671, as amended, R. 100). The defendants had no voice in the determination of those prices (R. 147). In the ten-year period in question there were steady and continuous increases in producers' price which show a total rise in raw milk cost from January, 1942, to January, 1948, of about 5 cents per quart (R. 135-7). The second largest cost factor to the handlers is

labor for processing and distributing the milk. Labor contracts are negotiated with the unions on an industry-wide basis with a consistent upward trend in the wages which affect the costs of both dairies identically (R. 330, 457). The same pattern is disclosed by the **other cost factors** such as gasoline used for delivery, coal burned in the plants, bottles, caps and other commodities required for the processing and distributing of Grade A milk by the handlers (R. 386).

The foregoing cost factors applicable to Grade A milk are regularly analyzed by the sales and accounting management of the company on the basis of a cost allocation and accounting system used by respondent for the past ten years (R. 374), and which follows the system established by the International Association of Milk Dealers (R. 377) and adopted by dairies generally throughout the country (R. 339). Under this system the allocation of all costs and expenses is on a functional basis as to each product sold by respondent. Materials, receiving expenses and labor processing expenses are allocated directly to the product to which they relate (R. 363-364). Delivery, selling and administrative expenses are allocated to each product on a point system which is based on selling units such as a quart of milk or a pound of butter, cheese and other similar products. The point system, upon which are also bottomed the union labor contracts, is predicated on the principle that the cost of delivery is alike for every unit (R. 382-383).

These are the cost factors and cost allocation data which are furnished to the president of St. Louis Dairy when its sales and accounting management advises him from time to time in connection with price determinations (R. 235, 304, 384-387). The only person vested with authority to, and who does as a matter of practice, determine prices is the president of the company, Mr. Lide (R. 234, 237, 303, 384, 385, 482).

One of the factors which is considered by Lide in arriving at a price determination is the price change which a competitor may already have announced or decided upon (R. 305, 392). It is important to find out price changes adopted or announced by any competitor at the earliest possible moment. Every employee of respondent is urged to get any available information from other drivers, stores where price lists may have been left, customers in general, of price changes made by a competitor and to immediately report to the management (R. 238-9, 314). Any price change of Pevely or other local handler affects the operation of respondent; of Pevely most, because it is largest, and the most serious competitor. If the change consists of a reduction, St. Louis Dairy would lose customers unless it promptly conforms; if it is an increase in price due to some change which has or soon will increase costs, it must consider moving too, since the same costs necessarily affect the operation of St. Louis Dairy in the same manner (R. 305-306, 393).

In order to be able to report to the management more promptly any price change determined or promulgated by Pevely, Julian W. Gee, sales manager of respondent, did on four occasions in the period August, 1939 (R. 248), to August 28, 1941 (R. 254),* exchange information with Joseph J. Wasser, Pevely's sales manager, concerning price changes, after they had been determined by the company making the change, but before the effective date of the change (R. 227, 228, 233-234, 246-250). Both Gee and Wasser, who testified as government witnesses, denied the existence of any conspiracy or agreement (R. 256 and 229, respectively). Nevertheless the government relied

* R. 254. On direct examination Gee testified that that conversation had taken place on September 2, 1941 (R. 234). Inasmuch as September 2 was the effective date of the price change, the reason for the apparent mistake is obvious. The conversation took place on August 28 and the price change was effective September 2.

on inferences contrary to the oral testimony of these witnesses.

After exchanges such as this were found to be a subject of criticism and thus discontinued,† respondent confined its sources of information about price changes decided and determined upon by competitors to that obtainable by the company's drivers, through newspaper reporters and similar media. This is the testimony of the government's witness (R. 238-9).

The evidence further shows that certain uniform price changes were made by both companies, as set forth in the indictment and the bill of particulars by the government, and that those **price changes** were **neither simultaneous nor were they always initiated by the same company** (R. 546-547, 564-565). Economic justification for each of those changes was testified to by a government witness (R. 249) and others (R. 308-320). The uniformity of the price changes was explained by the respondent's employees and by independent economists having personal experience in the St. Louis Milk Market situation: Judson P. Mason, the Director of Dairy Marketing for the Illinois Agricultural Association, with both government and private experience in the field, including service with the St. Louis Federal Milk Marketing Administration (R. 439-440); and Father Leo C. Brown, S. J., Professor of Economics at St. Louis University and a member of the Dairy Council (R. 452-454). They testified that **Grade A Milk is a standard product**, in that there is very little difference in the milk of one dairy as to another and that its butter fat, bacterial content and other requirements are brought into uniformity by rigid administration of the St. Louis Milk

† Peremptory instructions to that effect were given to Gee and Wasser by officials of their companies (R. 315 and 230-231, respectively) and Gee desired to avoid any appearance of impropriety, following a Grand Jury investigation (R. 254).

Ordinance. This ordinance, which embodies the sanitary requirements of the United States Public Health Service Ordinance (R. 442, 445) remained basically unchanged during the period involved here (Ordinance No. 40939 of December 15, 1936, as amended by Ordinance No. 41242 of February 23, 1938 and by Ordinance No. 41803 of April 4, 1940, R. 28-59). They further testified that in a competitive market the **cost factors being identical** for the relatively few sellers, and the supply of milk being short for all, **uniformity of prices and practically simultaneous price changes are the natural and inevitable result of the same economic pressures upon all** (Mason, R. 446-448; Brown, R. 457), bringing about almost simultaneous price announcements (R. 461-462).‡

All of the evidence, both on the government's and on the respondent's side, shows free and bitter competition exists between the two respondents, both in the continuous struggle to expand the milk supply at the expense of the other company, and in securing the customers of each other (R. 183, 257, 472, 473). That evidence was supported and amplified by independent experts who testified that there is plenty of competition among the dairies in the St. Louis market (R. 446-7, 455, 462).

During the regime of the O. P. A. both the minimum price paid to producers and the maximum price charged to customers were dictated by public authority. This program was supported by a government subsidy to the producers. At the termination of these conditions the supported price level was maintained by passing on the deficiency from the producers to the handlers, who in turn undertook to retrieve it from consumers (R. 146, 317).

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‡ This evidence is apparently overlooked by petitioner when it states (Petition, p. 4) that "During the period covered by the indictment the record reveals no instance of price competition between the two respondents in respect of Grade A milk."

The record shows that after the disestablishment of the O. P. A.'s milk control (June, 1946), the total price increases made by respondent to its customers until and including February, 1948, amounted to 5½¢ per quart on Grade A regular milk, whereas the total increase in the cost to it of material and labor for that period was 6¢ and a fraction per quart (R. 467-469). The government introduced no testimony upon this subject and the fact of this unfavorable price balance is uncontradicted by any evidence.

This is the circumstantial evidence in the case upon which the jury found defendant Lide "not guilty" and which the appellate court held insufficient as a matter of law to sustain the conviction of respondent.

SUMMARY OF THE ARGUMENT.

I. Certiorari does not issue to review evidence or inferences drawn from it.

Abrams v. United States (1919), 250 U. S. 616, 619, 63 L. Ed. 1173, 1176, 40 S. Ct. 17;

Chicago & N. W. R. Co. v. Ohle (1886), 117 U. S. 123, 129, 29 L. Ed. 837, 839, 6 S. Ct. 632;

General Talking Pictures v. Western Electric Company (1938), 304 U. S. 175, 82 L. Ed. 1273, 1275;

Lancaster v. Collins (1885), 115 U. S. 222, 225, 29 L. Ed. 373, 374, 6 S. Ct. 33;

Mortensen v. United States (1944), 322 U. S. 369, 374, 88 L. Ed. 1331, 1335, 64 S. Ct. 1037;

Troxell v. Delaware, Lackawanna & Western R. Co. (1913), 227 U. S. 434, 442, 57 L. Ed. 586, 590, 33 S. Ct. 274;

United States v. Socony-Vacuum Oil Co. (1940), 310 U. S. 150, 254, 84 L. Ed. 1129, 1184, 60 S. Ct. 869.

II. There is no conflict with the Supreme Court or among the Circuits as to the rule applied by the Court of Appeals below that respondent's motions for acquittal should have been sustained for the reason that there was no substantial evidence, considered in the light most favorable to the Government, to support the conviction.

1. The Court of Appeals applied the controlling substantial evidence rule, and did not weigh the evidence, as erroneously claimed by petitioner.

2. In determining the sufficiency of the circumstantial evidence, upon which the Government relied exclusively, the Court of Appeals was entitled to pass upon the reasonableness of the inferences to be drawn from the circumstances proven, and properly held that the motion of

acquittal should have been sustained in the absence of reasonable inferences supporting the conviction to the exclusion of the hypothesis of respondent's innocence.

American Tobacco Co. v. United States (C. C. A. 6, 1944), 147 F. 2d 93, 101, aff. (1946) 328 U. S. 781, 90 L. Ed. 1575, 66 S. Ct. 1126;

Appalachian Electric Power Co. v. N. L. R. B. (C. C. A. 4, 1938), 93 F. 2d 985, 989;

Beck v. United States (C. C. A. 8, 1929), 33 F. 2d 107, 112;

Bishop v. United States (C. C. A. 8, 1926), 16 F. 2d 410, 416-7;

Cady v. United States (C. C. A. D. C., 1923), 293 F. 829;

Consolidated Edison v. Columbian Enameling & Stamping Co., 306 U. S. 292, 300, 83 L. Ed. 660, 59 S. Ct. 501;

Cravens v. United States (C. C. A. 8, 1932), 62 F. 2d 261, 274;

Curley v. United States (C. A. D. C., 1947), 160 F. 2d 229, cert. den. 331 U. S. 837;

Dickerson v. United States (C. C. A. 8, 1927), 18 F. 2d 887, 893;

Eastern Coal Corp. v. N. L. R. B. (C. C. A. 4, 1949), 176 F. 2d 131, 136;

Edwards v. United States (C. C. A. 8, 1925, 7 F. 2d 357, 360;

Estep v. United States (C. C. A. 10, 1943), 140 F. 2d 40, 45;

Gargotta v. United States (C. C. A. 8, 1935), 77 F. 2d 977, 981;

Gold v. United States (C. C. A. 8, 1929), 36 F. 2d 16, 32;

Graceffo v. United States (C. C. A. 3, 1931), 46 F. 2d 852, 853;

Grant et al. v. United States (C. C. A. 3, 1931), 49 F. 2d 118, 119-120;

Grantello v. United States (C. C. A. 8, 1924), 3 F. 2d 117, 118;

Hammond v. United States (C. A. D. C., 1942), 75 U. S. App. D. C. 395, 127 F. 2d 752, 753;

Karchner v. United States (C. C. A. 7, 1932), 61 F. 2d 623;

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McLaughlin v. United States (C. C. A. 3, 1928), 26 F. 2d 1, 3;

Nicola v. United States (C. C. A. 3, 1934), 72 F. 2d 780, 786;

Nosowitz v. United States (C. C. A. 2, 1922), 282 F. 575, 578;

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Read v. United States (C. C. A. 8, 1930), 42 F. 2d 636;

Ridenour v. United States (C. C. A. 3, 1926), 14 F. 2d 888, 892-3;

Romano v. United States (C. C. A. 2, 1925), 9 F. 2d 522, 524;

Roukous v. United States (C. C. A. 1, 1912), 195 F. 353, 361, cert. den. 225 U. S. 710, 56 L. Ed. 1267, 32 S. Ct. 840;

Salinger v. United States (C. C. A. 8, 1927), 23 F. 2d 48, 52;

Schad v. 20th Century-Fox Film Corp. (C. C. A. 3, 1943), 136 F. 2d 991, 996;

Scott v. United States (C. C. A. 10, 1944), 145 F. 2d 405, 408, cert. den. 323 U. S. 801, 89 L. Ed. 639, 65 S. Ct. 561;

Spalitto v. United States (C. C. A. 8, 1930), 39 F. 2d 782, 784;

Sullivan v. United States (C. C. A. 8, 1922), 283 F. 865, 868;

Tingle v. United States (C. C. A. 8, 1930), 38 F. 2d 573, 575;

Turinetti v. United States (C. C. A. 8, 1924), 2 F. 2d 15, 17;

Union Pacific Coal Company v. United States (C. C. A. 8, 1909), 173 F. 737, 740;

United States v. Gasomiser Corporation (D. C. Dela., 1947, reh. den. 1948), 7 F. R. D. 712;

United States v. Laffman (C. C. A. 3, 1945), 152 F. 2d 393, 394;

United States v. Litberg (C. C. A. 7, 1949), 175 F. 2d 20, 21;

United States v. Valenti (C. C. A. 2, 1943), 134 F. 2d 362;

VanGorder v. United States (C. C. A. 8, 1927), 21 F. 2d 939, 942;

Wesson v. United States (C. C. A. 8, 1949), 172 F. 2d 931, 933;

Wiener v. United States (C. C. A. 3, 1922), 282 F. 799, 801;

Willsman et al. v. United States (C. C. A. 8, 1923), 286 F. 852, 856-7;

Yoffe v. United States (C. C. A. 1, 1946), 153 F. 2d 570;

Yusem v. United States (C. C. A. 3, 1925), 8 F. 2d 6, 8.

3. Applying the above rule to the case at bar, the Appellate Court was justified in holding that there was no substantial evidence of respondent's guilt, considering the

proven circumstances in a light most favorable to the government.

A. No reasonable inference of respondent's guilt to the exclusion of its innocence could be drawn from the uniformity of the retail and wholesale prices charged by the two dairies for Grade A milk and from the proximity in time of their prices changes, since the unrefuted positive evidence showed that those changes were dictated exclusively by impelling economic reasons, flowing from the undisputed facts that the cost factors for producing Grade A milk are substantially identical for both dairies, that Grade A milk is a standardized product sold in a tight market, and that those prices were decided upon by respondent in the exercise of its independent business judgment.

a. Each one of the price changes made by respondent, and in issue here, was dictated exclusively by impelling economic reasons, and was decided upon by respondent in the exercise of its independent business judgment. This is the undisputed fact of all the direct evidence.

American Tobacco Company v. United States (1946), 328 U. S. 781, l. c. 804, 90 L. Ed. 1575, l. c. 1591, 66 S. Ct. 1126.

b. Grade A milk being a standardized product sold in a tight market, and its cost items being substantially identical for both respondents, uniformity in prices and price changes is bound to result from those identical economic forces.

Cement Mfrs. Protective Ass'n v. United States (1925), 268 U. S. 588, 69 L. Ed. 1104;

Federal Trade Commission v. The Cement Institute et al. (1948), 333 U. S. 683, 708, 92 L. Ed. 1010;

United States v. International Harvester Co. (1927), 274 U. S. 693, 708-9, 71 L. Ed. 1302;

United States v. Standard Oil Company of New Jersey (D. C. E. D. Mo., 1931), 47 F. 2d 288, 316-317;
United States v. Sugar Institute (D. C. N. Y., 1934), 15 F. S. 817, 887.

c. The price changes in question were not simultaneous, nor were the price changes initiated always by the same respondent.

American Tobacco Company v. United States (1946), 328 U. S. 781, l. c. 804, 90 L. Ed. 1575, l. c. 1591, 66 S. Ct. 1126;
Davis v. United States (C. C. A. 6, 1901), 107 F. 753, 755;
Lilienthal's Tobacco v. United States (1878), 97 U. S. 237, 266, 24 L. Ed. 901, 905;
United States v. Standard Oil Company of New Jersey (D. C. E. D. Mo., 1931), 47 F. 2d 288, l. c. 316.

B. No reasonable inference of respondent's guilt to the exclusion of its innocence could be drawn from the remote conversations between Gee and Wasser, who appeared as government witnesses, and who by direct, unimpeached, uncontradicted and reasonable testimony denied any conspiracy.

Arnall Mills v. Smallwood (C. C. A. 5, 1933), 68 F. 2d 57, 59;
Cartello v. United States (C. C. A. 8, 1937), 93 F. 2d 412, 415;
Ezzard v. United States (C. C. A. 8, 1925), 7 F. 2d 808, 811;
Foran et al. v. Commissioner (C. C. A. 5, 1948), 165 F. 2d 705, 707;
Heard v. United States (C. C. A. 8, 1919), 255 F. 829, 832;
Howell Turpentine Co. v. Commissioner (C. C. A. 5, 1947), 162 F. 2d 319, 325;

Jacobson v. Hahn et al. (C. C. A. 2, 1937), 88 F. 2d 433;

Pennsylvania R. R. Co. v. Chamberlain (1933), 288 U. S. 333, 340-1, 77 L. Ed. 819, 823, 53 S. Ct. 391;

Tatt v. Commissioner (C. C. A. 5, 1948), 166 F. 2d 697, 699;

Texas Co. v. Hood et al. (C. C. A. 5, 1947), 161 F. 2d 618, 620, cert. den. 332 U. S. 829, 92 L. Ed. 403, 68 S. Ct. 206;

Winn v. Consolidated Coach Corp. (C. C. A. 6, 1933), 65 F. 2d 256, 257;

Yellow Cab Co. of Philadelphia v. Rodgers (C. C. A. 3, 1932), 61 F. 2d 729;

Young v. United States (C. C. A. 5, 1938), 97 F. 2d 200, 202, reh. den. 97 F. 2d 1023.

III. The Appellate Court properly held that the judgment of the District Court should be reversed because of prejudicial evidence received over objections of respondent, and the District Court erred in not striking from the record the evidence objected to by respondent.

Braatelien et al. v. United States (C. C. A. 8, 1945), 147 F. 2d 888, 892;

Commonwealth v. Giles, 1 Gray (Mass.) 466;

Kettenbach v. United States (C. C. A. 9, 1913), 202 F. 377, 383;

O'Hara v. Lamb Construction Co. (Mo. App., 1917), 197 S. W. 163, 165;

Union Electric Light & Power Co. v. Snyder Estate Co. et al. (C. C. A. 8, 1933), 65 F. 2d 297, 302-303;

United States v. Adams Express Co. (D. C. Iowa, 1902), 119 F. 240, 242;

United States v. Gouled (D. C. N. Y. 1918), 253 F. 239;

United States v. Pierce (D. C. N. Y. 1917), 245 F. 888, 890;

United States v. Socony-Vacuum Oil Co. (1940), 310 U. S. 150, 239-243.

IV. The Appellate Court did not hold, as suggested by petitioner, that (A) the statute of limitations applied to the case at bar, nor that (B) the jury's verdicts of conviction were discredited by the verdicts of acquittal.

Coen v. American Surety Co. of N. Y. (C. C. A. 8, 1941), 120 F. 2d 393, 400, cert. den. 314 U. S. 667, 86 L. Ed. 534, 62 S. Ct. 128;

People v. Altice Case (1922), 222 Mich. 379, 190 N. W. 289;

Watson v. St. Louis, I. M. & S. R. R. Co. (C. C. Ark. 1909), 169 F. 942, 945, aff. 223 U. S. 745, 56 L. Ed. 639, 32 S. Ct. 533.

ARGUMENT.

I.

Certiorari Does Not Issue to Review Evidence or Inferences Drawn From It.

As it appears from the Petition, and is more fully discussed hereinafter, the Government is seeking review of the decision below merely to have this Court pass on the sufficiency of the evidence and on the reasonableness of the inferences drawn from it. This Court has repeatedly stated that certiorari is not granted ordinarily for such purposes. Thus, in **General Talking Pictures v. Western Electric Company** (1938), 304 U. S. 175, 82 L. Ed. 1273, 1275, this Court said:

> "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U. S. 508, 68 L. Ed. 413, 44 S. Ct. 164; United States v. Johnston, 268 U. S. 220, 227, 69 L. Ed. 925, 926, 45 S. Ct. 496."

In an apparent attempt to keep outside the scope of those holdings, petitioner claims that the Appellate Court "has invaded the province of the jury" (Petition, p. 16). The charge is unwarranted as a reading of the opinion and the following discussion show. Moreover, it is significant that petitioner has not found a single case in which this Court has granted certiorari in a criminal case which may be considered a precedent in point here (Petition, p. 16). The Appellate Court did examine the record, not for the purpose of weighing the evidence, but for the purpose of determining whether there was substantial evi-

dence to support the verdict. That this is the proper rule is established by ample authority in the decisions of this Court:

Mortensen v. United States (1944), 322 U. S. 369, 374, 88 L. Ed. 1331, 1335, 64 S. Ct. 1037;

Abrams v. United States (1919), 250 U. S. 616, 619, 63 L. Ed. 1173, 1176, 40 S. Ct. 17;

Troxell v. Delaware, Lackawanna & Western R. Co. (1913), 227 U. S. 434, 442, 57 L. Ed. 586, 590, 33 S. Ct. 274;

Lancaster v. Collins (1885), 115 U. S. 222, 225, 29 L. Ed. 373, 374, 6 S. Ct. 33;

Chicago & N. W. R. Co. v. Ohle (1886), 117 U. S. 123, 129, 29 L. Ed. 837, 839, 6 S. Ct. 632.

This rule has been applied to a conviction for violation of the Sherman Act in **United States v. Socony-Vacuum Oil Co.** (1940), 310 U. S. 150, 254, 84 L. Ed. 1129, 1184, 60 S. Ct. 869, where this Court said:

> "A question of law is thus raised, which entails an examination of the record, not for the purpose of weighing the evidence but only to ascertain whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict."

II.

There Is no Conflict With the Supreme Court or Among the Circuits as to the Rule Applied by the Court of Appeals Below That Respondent's Motions for Acquittal Should Have Been Sustained for the Reason That There Was no Substantial Evidence, Considered in the Light Most Favorable to the Government, to Support the Conviction.

1. **The Court of Appeals applied the controlling substantial evidence rule, and did not weigh the evidence as erroneously claimed by petitioner.**

The crux of the petition and the main ground relied upon for the issuance of certiorari are predicated on the assertion that the Appellate Court committed a "basic error of law in reweighing for itself the evidence favorable to the respondents against that which supported their conviction" (Petition, p. 16; see also pages 7, 12, 13 and 15). The government's contention is founded on an erroneous premise, for the reason that the Court of Appeals **did not weigh the evidence.** It merely applied the substantial evidence rule. A reading of the opinion below makes this crystal clear:

> "* * * the question on review is * * * whether the verdict of guilty as against the corporations is sustained by substantial evidence * * *" (R. 661, 178 F. 2d Adv. Op. 363, 370).

This is the well settled rule of appellate review in a criminal case, and is no different from the substantial evidence rule which is admitted by petitioner (Petition, p. 12).

Applying this rule, the Court concluded:

> "We are of the view that the proven circumstances, considered in the light most favorable to the govern-

ment, are not inconsistent with the innocence of appellants, and hence, their motions for acquittal should have been sustained'' (R. 661, 178 F. 2d, l. c. 371).

As the following discussion will show, this is the inescapable result of the application of the rule to the evidence in this case, and there is no true issue as to controlling law.

2. **In determining the sufficiency of the circumstantial evidence, upon which the government relied exclusively, the Court of Appeals was entitled to pass upon the reasonableness of the inferences to be drawn from the circumstances proven, and properly held that the motion of acquittal should have been sustained in the absence of reasonable inferences supporting the conviction to the exclusion of the hypothesis of respondent's innocence.**

Petitioner asserts that the reviewing court committed error in ''substituting its judgment for that of the jury in deciding what inferences should be drawn from the evidence and what evidence should be believed'' [Petition, p. 7 (2) and passim]. This assertion is stoutly denied. The Appellate Court did not substitute its judgment for that of the jury, but merely exercised its traditional and time-honored function of determining whether the inference drawn by the trier of the facts is a **reasonable** one, viewing the evidence in the light most favorable to the government. Nor is there any conflict among the circuits on the point, as shown by the decisions discussed hereinafter.

Petitioner further contends that the Court below ''asserted the **dubious** principle that circumstantial evidence must not only be consistent with defendant's guilt but must be inconsistent with their innocence if it is to justify a verdict of guilty'' (Petition, p. 15, note 10; our emphasis).

This somewhat hesitant challenge against a well established principle of criminal procedure is purportedly supported by the government by reference to the cases of **Curley v. United States** (C. A. D. C., 1947), 160 F. 2d 229; **United States v. Valenti** (C. C. A. 2, 1943), 134 F. 2d 362, and **Yoffe v. United States** (C. C. A. 1, 1946) 153 F. 2d 570.

But all three of these cases involved evidentiary situations entirely different from that at bar. Secondly, not one of those decisions actually sustains the government's contention. In the **Curley** case, the Court did not rule out the function of the reviewing court to pass on the reasonableness of the inferences:*

> "The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy. The critical point in this boundary is the existence or non-existence of a reasonable doubt as to guilt. **If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal,** because no other result is permissible within the fixed bounds of jury consideration. But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make" (160 F. 2d, l. c. 232). (Our emphasis.)

In the **Valenti** case, the Court reviewed the evidence and concluded that the inferences drawn by the jury were both "logical and natural" (134 F. 2d, l. c. 364) and that "the bases for inference seem to us quite substantial" (134 F. 2d, l. c. 365). After having stated the passage re-

* It is significant that in **Peters v. United States** (1947), 160 F. (2d) 319, 320, cert. den. (1947) 331 U. S. 825, 91 L. Ed. 1840, 67 S. Ct. 1316, the Court of Appeals for the Eighth Circuit referred to the **Curley** case as supporting the propositions that "Circumstantial evidence is sufficient to sustain a verdict when the facts and circumstances are such as legitimately tend to sustain an inference of their existence." (Our emphasis.)

lied upon by petitioner here (Petition, p. 15, note 10) the Court added:

> "We have applied these principles repeatedly in allowing the jury to draw **rational** inferences from facts in evidence" (134 F. 2d, l. c. 364). (Emphasis added.)

Thus, the Court did pass on whether there was a "substantial" basis for the inferences drawn by the jury and on whether those inferences were "logical", "natural" or "rational"—which is the rule of reasonableness applied by the appellate court in the case at bar.

It is even more obvious that the **Yoffe** case offers no support to the government's contention.

These decisions are not in conflict with the traditional rule of the scope of appellate review, which involves passing on the **reasonableness** of the inferences to be drawn from circumstantial evidence. **American Tobacco Co. v. United States** (C. C. A. 6, 1944), 147 F. 2d 93, 101, aff. (1946) 328 U. S. 781, 90 L. Ed. 1575, 66 S. Ct. 1126.

Thus, in **United States v. Litberg** (1949), 175 F. 2d 20, 21, the Court of Appeals for the Seventh Circuit reversed a conviction on the ground of insufficient evidence, stating the rule:

> "On the one hand, we must keep in mind the oft repeated rule that the weight and credibility to be attached to testimony of the witnesses is a matter for the trier of the facts and that we are required to take that view of the evidence most favorable to the government. On the other hand, while the trier of the facts is entitled to draw all reasonable inferences from the circumstances in proof, **a court of review is charged with the responsibility of determining the reasonableness of such inferences.** In other words an

inference may not properly be relied upon in support of an essential allegation if an opposite inference may be drawn with equal consistency from the circumstances in proof." (Our emphasis.)

Similarly, the Third Circuit reversed a conviction in **United States v. Laffman** (1945), 152 F. 2d 393, 394, reiterating the rule that:

> "'In order to justify a conviction of crime on circumstantial evidence it is necessary that the directly proven circumstances be such as to exclude every reasonable hypothesis but that of guilt.' United States v. Russo, 3 Cir., 1941, 123 F. 2d 420, 423. Accord: United States v. Tatcher, 3 Cir., 1942, 131 F. 2d 1002."†

To the same effect, **Turinetti v. United States** (C. C. A. 8, 1924), 2 F. 2d 15, 17, where, reversing a conviction, the Court said:

> "Whenever a circumstance, relied on as evidence of criminal guilt, is susceptible of two inferences, one of which is in favor of innocence, such circumstance is robbed of all probative value, even though from the other inference, guilt may be fairly deducible."*

See, in accord, the Tenth Circuit in **Estep v. United States** (1943), 140 F. 2d 40, 45, and in **Scott v. United States** (1944), 145 F. 2d 405, 408, cert. den. 323 U. S. 801, 89 L. Ed. 639, 65 S. Ct. 561. The analogous rule was asserted by the Fourth Circuit in civil cases.**

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† See also, in a civil suit, **Schad v. 20th Century-Fox Film Corp.** (1943), 136 F. 2d 991, 996.

* The same rule was asserted by that Court in **Peightel v. United States** (1931), 49 F. 2d 235, 240; **Tingle v. United States** (1930), 38 F. 2d 573, 575, and in **Dickerson v. United States** (1927), 18 F. 2d 887, 893.

** **Appalachian Electric Power Co. v. N. L. R. B.** (1938), 93 F. 2d 985, 989, cited with approval by this Court in **National Labor Relations Board v. Columbian Enameling & Stamping Co.**, 306 U. S. 292, 300, 83 L. Ed. 660, 59 S. Ct. 501, and **Eastern Coal Corp. v. N. L. R. B.** (1949), 176 F. 2d 131, 136.

The same principle is aptly expressed in a well considered opinion of the Court in **United States v. Gasomiser Corporation** (D. C. Dela. 1947, reh. den. 1948), 7 F. R. D. 712. Rejecting the identical contention which is urged here by the government, the Court said:

> "* * *, it should first be stated that in applying the 'circumstantial evidence rule' the court accepts all of the government's evidence as true and looks at it in the light most favorable to the government. But the court does not draw **all possible inferences** in favor of the government; it rather draws **all inferences reasonably deducible** from the evidence taken in the light most favorable to the government. See Yoffe v. United States, 1 Cir., 1946, 153 F. 2d 570, 573.
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> * * * * * * *
>
> "It should be made clear, however, that while all the government's evidence is accepted as true, the court may very well look to the defense evidence for the purpose of ascertaining a reasonable hypothesis other than guilt" (7 F. R. D., l. c. 720, 721).

As stated long ago by the Eighth Circuit in **Union Pacific Coal Company v. United States** (1909), 173 F. 737, 740:

> "There was a legal presumption that each of the defendants was innocent until he was proved to be guilty beyond a reasonable doubt. The burden was upon the government to make this proof, and evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. * * * and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction. Vernon v. United States, 146 Fed. 121, 123, 124, 76 C. C. A. 547, 549, 550; United States v. Richards (D. C.), 149 Fed. 443, 454; Hayes v. United States (C. C. A.), 169 Fed. 101, 103; United States v. Hart

(D. C.), 78 Fed. 868, 873, affirmed in Hart v. United States, 84 Fed. 799, 28 C. C. A. 612; United States v. M'Kenzie (D. C.), 35 Fed. 826, 827, 828; United States v. Martin, 26 Fed. Cas. 1183, 1184 (No. 15,731); People v. Ward, 105 Cal. 335, 341, 38 Pac. 945; People v. Murray, 41 Cal. 66, 67; State v. Hunter, 50 Kan. 302, 32 Pac. 37; Bradshaw v. State, 17 Neb. 147, 22 N. W. 361, 366."‡

The Eighth Circuit does not stand alone, but follows the overwhelming weight of the authorities:

First Circuit: **Roukous v. United States** (1912), 195 F. 353, 361, cert. den. 225 U. S. 710, 56 L. Ed. 1267, 32 S. Ct. 840.

Second Circuit: **Nosowitz v. United States** (1922), 282 F. 575, 578; **Romano v. United States** (1925), 9 F. 2d 522, 524.

Third Circuit: **McLaughlin v. United States** (1928), 26 F. 2d 1, 3; **Nicola v. United States** (1934), 72 F. 2d 780, 786; **Wiener v. United States** (1922), 282 F. 799, 801; **Yusem v. United States** (1925), 8 F. 2d 6, 8; **Ridenour v. United States** (1926), 14 F. 2d 888, 892-3; **Grant et al. v. United States** (1931), 49 F. 2d 118, 119-120; **Graceffo v. United States** (1931), 46 F. 2d 852, 853.

‡ This fundamental rule, which is expressly recognized in the **Yoffe** case (153 F. 2d, l. c. 572-3), relied upon by petitioner here (Petition, p. 15, note 10), has been reasserted in an impressive series of consistent decisions of the Eighth Circuit:

Sullivan v. United States (1922), 283 F. 865, 868;
Willsman et al. v. United States (1923), 286 F. 852, 856-7;
Grantello v. United States (1924), 3 F. 2d 117, 118;
Edwards v. United States (1925), 7 F. 2d 357, 360;
Bishop v. United States (1926), 16 F. 2d 410, 416-7;
Van Gorder v. United States (1927), 21 F. 2d 939, 942;
Salinger v. United States (1927), 23 F. 2d 48, 52;
Beck v. United States (1929), 33 F. 2d 107, 112;
Gold v. United States (1929), 36 F. 2d 16, 32;
Spalitto v. United States (1930), 39 F. 2d 782, 784;
Read v. United States (1930), 42 F. 2d 636;
Cravens v. United States (1932), 62 F. 2d 261, 274;
Gargotta v. United States (1935), 77 F. 2d 977, 981;
Wesson v. United States (1949), 172 F. 2d 931, 933.

Seventh Circuit: **Karchmer v. United States** (1932), 61 F. 2d 623.

Tenth Circuit: **Parnell v. United States** (1933 on rehearing), 64 F. 2d 324, 329; **McClintock v. United States** (1932), 60 F. 2d 839, 842.

Court of Appeals, District of Columbia: **Hammond v. United States** (1942), 75 U. S. App. D. C. 395, 127 F. 2d 752, 753; **Cady v. United States** (1923), 293 F. 829.

This is the general rule stated in 16 C. J. 763:

> "In order to sustain a conviction on circumstantial evidence, all the circumstances proved must be consistent with each other, consistent with the hypothesis that accused is guilty, and at the same time inconsistent with the hypothesis that he is innocent, and with every other rational hypothesis except that of guilt."

These authorities clearly support the rule of law adopted by the Appellate Court below. Let us now review briefly the evidence to which the rule was applied.

3. Applying the above rule to the case at bar, the Appellate Court was justified in holding that there was no substantial evidence of respondent's guilt, considering the proven circumstances in a light most favorable to the government.

The case was presented by the government on circumstantial evidence, the government admitting that it "has no evidence of an express written or oral agreement among the defendants" (R. 22 and 71).

The circumstantial evidence consisted of the uniformity of the retail and wholesale prices charged by the corporate defendants for Grade A regular fluid milk sold by them in the St. Louis area, and of the proximity in time

of the price changes listed in the Indictment, Bill of Particulars and Supplements. In addition, the government showed certain conversations between two employees of the respondents concerning price announcements, in the period August, 1939—August 28, 1941 (not later), (R. 248-250). No other evidence was introduced by the government and its case is therefore entirely based on the inferences drawn from those facts.

A. **No reasonable inference of respondent's guilt to the exclusion of its innocence could be drawn from the uniformity of the retail and wholesale prices charged by the two dairies for Grade A milk and from the proximity in time of their price changes, since the unrefuted positive evidence showed that those changes were dictated exclusively by impelling economic reasons, flowing from the undisputed facts that the cost factors for producing Grade A milk are substantially identical for both dairies, that Grade A milk is a standardized product sold in a tight market, and that those prices were decided upon by respondent in the exercise of its independent business judgment.**

a. **Each one of the price changes made by respondent, and in issue here was dictated exclusively by impelling economic reasons, and was decided upon by respondent in the exercise of its independent business judgment. This is the undisputed fact of all the direct evidence.**

The undisputed testimony in the record shows that the matter of price changes was most thoroughly analyzed by the management of respondent, consisting of the President, Lide, the Vice-President, Versen, the Comptroller, Reinhart, and the Sales Manager, Gee, at regular meetings at which the economic factors bearing on costs were scrutinized and discussed (R. 235, 304, 377-378, 390-391). It was only after a complete evaluation of the above eco-

nomic conditions and factors that price changes were arrived at by the President of the company, Lide, who alone had authority to make price decisions (R. 70, 80, 234, 237, 303, 384-5, 482). This was done on the basis of all available information, and of the cost accounting and allocation system followed by respondent for some ten years before the return of the indictment here (R. 374) and conforming to the system established by the International Association of Milk Dealers (R. 377, 339).

As the Appellate Court properly remarked:

> "All this evidence is undisputed and the integrity of the cost accounting and allocation system used by appellants and the correctness of the conclusion reached is not challenged by any direct evidence" (R. 656, 178 F. 2d, l. c. 367-8).

Following that system, the Comptroller collected for the trial the data pertinent to the cost allocations on Grade A milk (R. 394-395). These data were checked by a staff of independent and nationally known auditors which had audited the company's books since 1940 (R. 336, 367, 339), and are incorporated in a detailed cost analysis introduced in evidence as St. Louis Dairy's Exhibit C (R. 347-360).

Summarizing the data broken down in said Exhibit C, **Comptroller Reinhart** prepared and testified from Exhibit G (R. 466) to the effect that, after the last maximum prices for consumers fixed by the government under O. P. A. (June, 1946), the total price increases made by St. Louis Dairy until and including February 5, 1948 amounted to **5½ cents a quart** (R. 467-468), whereas the total increase of respondent's costs for labor and materials during that period was **6 cents and a fraction** (R. 469).

That evidence and testimony is undisputed in this case, thus fully justifying the conclusion of the Appellate Court:

"It appears without dispute that the increases in the price of milk charged by the appellants was somewhat less than the increase in the cost of purchasing and processing the product" (R. 656, 178 F. 2d, l. c. 367).

This fact alone would seem sufficient to dispel any inference of conspiratorial agreement among defendants to fix prices. This is particularly true in view of the additional charge in the Indictment that the conspiracy had the intended effect of "**increasing** * * * prices to consumers and other purchasers of fluid milk sold by the corporate defendants" (Indictment, paragraph 14, R. 9; our emphasis).

This is not a proper situation for certiorari. The case turned on its own peculiar facts. A detail explanation was furnished by the defendants' witnesses as to every single one of the price changes included in the government's charges (R. 249, 308-320). The oral testimony was supported by ample documentation and was not claimed by anyone to be unreasonable or beyond the normal course of business in any respect. There was no countervailing evidence received or offered, either in rebuttal or by means of cross-examination.

Thus, unlike the **American Tobacco** and other anti-trust cases in which convictions were sustained on appeal,* in the case at bar there was economic justification for each one of the price changes made by respondent, and that evidence is undisputed. Therefore, the Appellate Court properly concluded that:

". . . each increase which is specifically charged either in the indictment or in the bill of particulars is rationally explained and accounted for and shown

* **American Tobacco Co. v. United States** (1946), 328 U. S. 781, l. c. 804, 90 L. Ed. 1575, l. c. 1591, 66 S. Ct. 1126.

to have resulted from economic conditions which increased the cost of processing and distributing, and, as before suggested, this evidence is wholly without contradiction" (R. 657, 178 F. 2d, l. c. 368).

b. **Grade A milk being a standardized product sold in a tight market, and its cost items being substantially identical for both respondents, uniformity in prices and price changes is bound to result from those identical economic forces.**

The undisputed evidence in the case bears out fully the above proposition. The **shortage of milk** in the St. Louis area was established by Government witnesses (R. 143, 157, 177, 235), and was confirmed by independent witnesses (R. 442, 459). It is undisputed in the record, as is the fact that the product is fully and completely **standardized** by virtue of the St. Louis Milk Ordinance. This fact was established by testimony of experts* and no rebuttal evidence was furnished by the Government. Consequently the Appellate Court was entitled to conclude that

> "The milk as handled by appellants was a standardized product" (R. 657, 178 F. 2d, l. c. 368).

The evidence showing basic **identity of the cost factors** was reviewed in the Statement, supra. Here again, taking the record as a whole, there is not a scintilla of evidence in it to disprove the basic equality of the cost factors for respondent and its competitor Pevely. Nor in the very nature of these operations could there be.

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* Judson P. Mason testified as follows:

"There is a very little difference in the milk of one dairy as to another, standard products as to butter fat tests, bacterial contents and other uniform requirements.

Q. Other factors that are brought into uniformity through the Health Department in the working out of its ordinance? A. That's right" (R. 445).

Likewise Father Leo C. Brown stated:

"* * * speaking of the Grade A milk market * * * we have here a highly standardized product, the product of one dealer being the same as the product of another dealer" (R. 455).

The conclusion is inescapable: the cost factors being the same, how could the price be different for the same standardized product in a highly competitive market, where the supply is inadequate? There is undisputed testimony that the market is highly competitive (R. 446-447, 472, 322), and both economists who testified in the trial agreed that in such a market as the one involved here, with few sellers, a standardized product, and identical cost factors,

> "I would expect practically uniformity of price, with slight exceptions, and practically simultaneous change in price" (Father Brown: R. 457);
>
> "* * * if somebody breaks under that [same] pressure by raising prices, you will find normally that other handlers will come up and meet it in a tight market" (Mason: R. 446).

The testimony of these independent experts and economists is fully supported by the standard and most authoritative treatises on the subject, some of which are summarized in the opinion of the Appellate Court (R. 657-8; 178 F. 2d, l. c. 368-9).

The Government's theory that uniformity in prices and identical pattern in price changes is tantamount to an agreement to fix prices and that similar action is identical to concert of action seems to accept the spurious doctrine of "conscious parallelism." This doctrine by identifying uniformity of prices with an agreement to fix prices results in denying to business men the right to take into account in their price policies the prices of their competitors and to anticipate, and react to, expected price changes by others. That doctrine denies one of the elements of free enterprise in a self-styled attempt to protect it. To carry it to its logical conclusion, the doctrine results in forcing artificial **price dissimilarity**, in order that business men

may escape the danger of anti-trust prosecutions. If that doctrine were accepted by the courts it would then become a matter of judicial determination which seller was thereafter to sell at the lower price and which at the higher price—which buyer would have the privilege of buying at less cost and which at the higher. As the above quoted economists state from their scholarly analyses of price trends in free markets, prices ordinarily level off and, after the changes due to cost adjustments, show a pattern of uniformity for the same standardized product in the same tight market where a few sellers sell to a large mass of informed buyers. As the decision below points out, "These economic principles must of necessity be recognized by the courts" (R. 658; 178 F. 2d, l. c. 369).

Thus, in **Cement Mfrs. Protective Ass'n v. U. S.** (1925), 268 U. S. 588, 69 L. Ed. 1104, this Court reversed the judgment of the District Court granting a perpetual injunction for violation of the Sherman Act. In rendering the opinion Justice Stone* stated, inter alia:

> "* * * the fact is that any change in quotations of price to dealers promptly becomes well known in the trade through reports of salesmen, agents, and dealers of various manufacturers. **It appears to be undisputed that there were frequent changes in price, and uniformity has resulted not from maintaining the price at fixed levels, but from the prompt meeting of the changes in price by competing sellers.**
>
> "It is urged by defendants that such uniformity of prices as existed in the trade was due to competition. They offered much evidence tending to show

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* The recent Supreme Court decision in **Federal Trade Commission v. The Cement Institute et al.** (1948), 333 U. S. 683, 92 L. Ed. 1010, in no way can be said to have detracted from the authoritative value of the "Old Cement case," which is there expressly and repeatedly distinguished:

> "The court's holding in the Old Cement Case would not have been inconsistent with a judgment sustaining the Commission's order here, even had the two cases been before this Court the same day" (l. c. p. 708).

complete independence of judgment and of action of defendants by large expenditures in competitive sales efforts and by variations in the volume of their production and shipment, earnings and profits. A great volume of testimony was also given by distinguished economists in support of the thesis that, in the case of a standardized product sold wholesale to fully informed professional buyers, as were the dealers in cement, uniformity of price will inevitably result from active, free, and unrestrained competition, and the **Government, in its brief, concedes that 'undoubtedly the price of cement would approach uniformity in a normal market in the absence of all combinations between the manufacturers'** " (268 U. S., l. c. 605-6, 69 L. Ed., l. c. 1111-1112). (Our emphasis.)†

In **U. S. v. Sugar Institute** (D. C. N. Y., 1934), 15 F. S. 817, 887, which was a suit in equity under the Sherman Act, the Court reviewed the alleged agreement on basic prices and the general effect of the Institute on price levels, and stated:

"The evidence shows that defendants' product is in all respects a standardized product; uniformity of basic price in any given area is therefore to be expected under a regime of free competition. Cement Mfrs. Protective Ass'n v. U. S., 268 U. S. 588, 605, 606, 45 S. Ct. 586, 69 L. Ed. 1104 (1925)."

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† Note also the following language:

"We realize also that uniformity of price may be the result of agreement or understanding, and that an **artificial price level**, not **related to the supply and demand of a given commodity**, may be evidence from which such agreement or understanding, or some concerted action of sellers operating to restrain commerce, may be inferred" (268 U. S., l. c. 606, 69 L. Ed., l. c. 1112). (Our emphasis.)

The above passage is highly significant. Before uniformity of prices may become evidence of a conspiracy, those prices must be shown to be "artificial" and "not related to the supply and demand of a given commodity." The whole evidence in this case is unequivocally to the contrary.

The principle thus announced by the District Court was in no wise modified by this Court when it reviewed that decision. 297 U. S. 553, 600, 80 L. Ed. 859, 877, 56 S. Ct. 629.

In **United States v. International Harvester Co.** (1927), 274 U. S. 693, 71 L. Ed. 1302, it was contended that the defendant was violating the Sherman Act in that, inter alia, it dominated the interstate trade in harvesting machinery by the compulsory regulation of prices. Rejecting this contention, this Court said, l. c. pp. 708-9:

> "The most that can be said as to this is that many of its competitors have been accustomed, independently and as a matter of business expediency, to follow approximately the prices at which it has sold its harvesting machines; but one of its competitors has habitually sold its machines at somewhat higher prices. * * * And the fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination."

In **United States v. Standard Oil Company of New Jersey** (D. C., E. D. Mo., 1931), 47 F. 2d 288, the Court, in a decision of three circuit judges, made clear that no restraint on competition is to be inferred from uniformity of prices arising out of price leadership. Thus the Court said, l. c. 316-317:

> "* * * if the major companies follow the Socony prices in this area, they do so because they do not wish to engage in a price-cutting war which might entail losses to all concerned (including Socony) without any compensating benefits. Such a view has no sinister aspect, but is merely a matter of business judgment and prudence illustrated in every community in the country by retail competitors in all lines

[citing authorities]. Grocers, butchers, and all other lines in the same markets, generally sell the same things at the same prices, for the sound reasons that they wish to get all they can, that they cannot get more than the price at which the bulk of what is sold in their respective markets is selling, and that they do not think it wise to cut prices."

In the case at bar the evidence reviewed above and these authorities fully support the conclusion of the Appellate Court that:

> "We are clear that mere uniformity of prices in the sale of a standardized commodity such as milk is not of itself evidence of a violation of the Sherman Anti-Trust Act" (R. 659; 178 F. 2d, l. c. 369).

c. **The price changes in question were not simultaneous, nor were the price changes initiated always by the same respondent.**

The dates at which the price changes of the dairies became effective and the dates on which each respondent ordered from its printer the new price announcement are stipulated in the record (R. 546-547, 564-565), and, for the convenience of the Court, are summarized in the following tabulation:

St. Louis Dairy Company		Pevely Dairy Company	
Date Price Change List Received by Printer	Date Price Change Effective	Date Price Change List Received by Printer	Date Price Change Effective
7/ 3/46, 4:30 P. M.	7/ 4/46	7/ 2/46	7/ 3/46
7/ 8/46, 6:30 P. M.	7/ 9/46	7/ 9/46	7/10/46
10/ 4/46, 11:00 A. M.	10/ 5/46	10/ 3/46	10/ 4/46
1/17/47, 8:30 A. M.	1/20/47	1/20/47 (copy delivered Pevely same day)	1/20/47
7/30/47, 5:00 A. M.	8/ 1/47	7/25/47 (copy delivered Pevely July 29)	8/ 1/47
9/11/47, 4:00 P. M.	9/16/47	9/15/47, 9:15 A. M.	9/16/47
1/26/48, 9:00 A. M.	1/28/48	1/23/48 (delivered same day)	1/27/48

The dates appearing in bold type in the foregoing tabulation indicate which company initiated the price change, and they clearly dispel not only the charge that the price changes were simultaneous, as the government claimed, but also any suggestion that the same respondent was taking leadership in the price pattern, as occurred, for instance in the **American Tobacco** case.* It will be borne in mind that there were a varying number of other competing handlers in the area, averaging about thirty in normal times (R. 137, 445), and that these figures of the two largest ones are selected out of the field because these two alone were indicted and charged.**

The above facts and dates having been stipulated by all parties, the position of respondents in this case is stronger than the position of defendants in **United States v. Standard Oil Company of New Jersey**, supra, l. c. p. 316, where the Court referred to the fact that the prices of the major oil companies were changed at close to the same time, and stated:

> "The reasons for such uniformity as exists are not far to seek * * *. While there is sharp conflict in the evidence as to which company first makes changes in prices, it is evident that Socony could do so, and, if that change were a reduction, its competitors, generally speaking, would be compelled to follow that lead. 'But even if it be taken that others, in this area, 'follow' (in the above sense) the Socony prices, that is not governing, because there is no element of compulsion or attempt at compulsion present, although it is, as contended, proof of its business power in this area."

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* American Tobacco Co. v. United States, supra, l. c. 804.

** Thus, there is no basis whatever in the record for the statement of petitioner (Petition, p. 10) and of the trial court that "Of all the dairies in St. Louis only the two defendants could fathom with such minute exactitude as to date and amount when and in what amount the two defendants would make a price change" (79 F. S. 12, 18). Since only two dairies were indicted and the evidence was circumscribed to them alone, the assertion of the trial court and of petitioner belongs to the realm of speculations and assumptions and is wholly unwarranted by the evidence.

Let us analyze a few of the price changes tabulated above. The first one was ordered by Pevely on July 2, 1946, effective on the 3rd. What is the undisputed testimony as to St. Louis Dairy? That testimony is that St. Louis Dairy did not order a price change notice to its printer until July 3rd, at 4:30 P. M., effective the following day. On July 8, 1946, St. Louis Dairy ordered a new price announcement to its printer, effective on the following day. Obviously, Pevely knew nothing about it at that moment, as it is only on the 9th that it ordered to its printer a price change notice effective not on the same, but on the following day.

On July 25, 1947, Pevely ordered its price change schedule, which was delivered to it on July 29th. It was only on the 30th that St. Louis gave the order to the printer, that is, **five days** after Pevely's order. The September price change shows that **four days** elapsed between the price change orders of the two dairies and **three days** are involved in the January, 1948, change. Had there been a conspiracy to fix prices, as charged, why this time lag? There is one common feature to all three instances, namely, that the dairy which followed the leadership of the other was able to give its price list to the printer **only 24 hours** before the other's prices became effective—a fact which is clearly explained considering the availability of that information through wholesale stores (which receive the list prior to its effective date), newspaper publicity through news items of announced price changes, or other media of discovery. There is reason for the dairy's policy of secrecy as to proposed price changes so far as its customers are concerned, since customers' buying and ordering practices might be altered by advance notice of future prices.

The Petitioner argues that the alternating of the two appellants in initiating the price changes is further evidence of the prearranged scheme and of the conspiracy (Petition, p. 4, footnote 3). In this argument Petitioner

is illogical. It would be more reasonable to suppose that if there were a conspiracy and an effective scheme were devised to create favorable appearances, a less obvious synchronization would have been resorted to. The tabulation of the printers' orders shows unmistakably the lack of any preconcerted plan of action. It is proof of the fact that the dairy following the leadership of its competitor without advance knowledge of the price changes either at the time they were decided upon or even at the time the new price list was transmitted to the printer.

The tabulation conclusively shows that in no instance were lists of price changes ordered by respondents from their printers on the same day. The gap between the dates on which the price lists were ordered is most revealing. After the printer delivered the list to its dairy, there was opportunity for the alert agents and employees of the other respondent to pick up the list or the information contained in it from many possible sources as they were urged to do (R. 238-9, 314). In one instance, as many as five days elapsed before the other dairy ordered its price changes. Would this be the practice of two participants in an agreement to fix prices—an agreement which necessarily requires the meeting of the minds on those price changes?

No detail oral testimony supplementing these documents with the outside concurrent memory of witnesses appears in the record, to be sure. In the rush and hurry of the day to day conduct of the dairy business it would not be expected that such evidence would be available for remote periods. But the records of the printer happily were intact, and they enable the Court to perceive how it was done.

This evidence is properly summarized by the Appellate Court in the following sentences:

"It is to be observed too that the price changes in question were not simultaneous. Neither were the changes uniformly initiated by the same appellant" (R. 659; 178 F. 2d, l. c. 369).

No inference of agreement arises from these facts. On the contrary the conclusion is inescapable that the timing in the price changes as to the period in which the pertinent records were available fully disproves any suggestion or inference of conspiratorial agreement or concerted action by respondents, both of which were subject to the same economic pressures operating in the same tight St. Louis milk market whereby prices of their standardized product are irresistibly driven to uniformity.

It is significant that petitioner has not cited any case even remotely involving a comparable situation, in which a conviction for violation of the Sherman Act was sustained on evidence of price uniformity and of close time proximity in price changes. As for **Davis v. United States** (C. C. A. 6, 1901), 107 F. 753, 755, quoted by the District Court below in the passage reproduced at p. 10 of the Petition, the evidence there is so far removed from that of the case at bar that any comment to distinguish it would be supererogation on our part.

Under the authority of the decisions reviewed above, it is clear that the evidence in this case fully justified the conclusion of the Appellate Court that no reasonable inference of respondent's guilt, to the exclusion of its innocence, could be drawn from the proven circumstances. If two inconsistent inferences might be logically possible, the evidence was insufficient to sustain the conviction, and to overcome the presumption of innocence which is the guiding star of our criminal law system. As this Court

said in **Lilienthal's Tobacco v. United States** (1878), 97 U. S. 237, 266, 24 L. Ed. 901, 905:

> "* * * in criminal trials the party accused is entitled to the legal presumption in favor of innocence, which, in doubtful cases, is always sufficient to turn the scale in his favor."

B. No reasonable inference of respondent's guilt to the exclusion of its innocence could be drawn from the remote conversations between Gee and Wasser who appeared as government witnesses, and who by direct, unimpeached, uncontradicted and reasonable testimony denied any conspiracy.

Petitioner (Petition, pp. 5, 9 and 11) and the District Court below (79 F. S., l. c. 17-18) laid great emphasis upon the conversations between Gee and Wasser in the remote period of August, 1939, until August 28, 1941. These conversations involve **four** instances (R. 246-250, 262) out of the seven price changes complained of by the government in that period and of the fourteen charged for the whole ten years. To prove those conversations Gee and Wasser were called as government witnesses. Gee and Wasser were examined by government's counsel from the transcript of their testimony before the Grand Jury in 1942, which was fully used to refresh Gee's recollection (R. 263-4). They both admitted having given to each other information concerning price changes decided upon by the respective companies before the date the change went into effect, but **in no instance was any information concerning any contemplated price changes given by either respondent before the price change had been decided upon** (R. 227, 228, 233-4, 246-250). This was the natural position, since neither of them had any authority to fix prices, or announce a price change until after its determination by the responsible heads of their companies.

Petitioner (Petition, p. 11) questions the reason for the exchange of information between Gee and Wasser. But it takes no economist to know that every competitor is interested in the price policy of the others, and when no harm results from the mutual disclosure of that information, why should the direct exchange be avoided? In their normal and natural perspective those conversations do not have any of the sinister connotations that the government is trying to insinuate. When that source of information was eliminated in August, 1941, because its propriety was being questioned (R. 230, 254), other media were resorted to, and notice of price changes, in advance of their effective dates was obtained through newspapers, price lists left at stores, etc. (R. 238-239, 247). Petitioner's purported analogy (Petition, p. 11) of a meeting at which A says, "I am going to raise my price 10 cents next week" and B says, "I will, too"—which the government claims to be another form of conspiratorial price fixing—is simply inapplicable to the present situation. There is no evidence of either one of the sales managers saying, "I will, too". It is undisputed that neither Gee nor Wasser had authority to fix prices for their respective companies (as to Wasser: R. 229, 230, 231; as to Gee: R. 234, 235, 237, 303, 384-5, 482).

Moreover, in the course of their testimony, the existence of any conspiratorial agreement was positively and emphatically denied:

> "Now, Mr. Gee, in connection with any of these price changes, as Sales Manager for the St. Louis Dairy Company, did you ever agree with Mr. Wasser or anybody, any competitor, to a price change or price increase? A. I most certainly did not.
>
> "Q. Ever in your life? A. Never" (R. 256; see also R. 229).

This testimony, which is fully supported by the other employees and officers of respondent (R. 393-4, 479-81, 322), is binding on the government, which chose to call Gee and Wasser as witnesses. In the teeth of these positive denials of agreement, the petitioner asserts that a conspiratorial agreement may be inferred from their testimony (Petition, pp. 8-11, 15).

Rejecting this contention, the Appellate Court pointed out:

> "The evidence is undisputed that they did not make any agreement with reference to the fixing of prices and it is equally undisputed that they did not communicate the knowledge of the changes determined upon by reason of any agreement between the dairy companies. This testimony, we think, forms no basis for a legitimate inference of the making of or participation in any sort of a conspiracy for the fixing of prices" (R. 659; 178 F. 2d, l. c. 369-370).

The Appellate Court refers to its previous decision in **Cartello v. United States** (1937), 93 F. 2d 412, 415, wherein the Court stated inter alia:

> "It is argued that these ballots could have been erased in the very presence of the government witnesses Lemon and Lynch without their knowledge, but the evidence is to the contrary and convictions cannot be sustained on mere possibilities. Had these witnesses, with personal knowledge, not been placed upon the witness stand by the government, there might be some room for suspicion or surmise that this had been done, but the government has itself proven that although the ballots were altered, they were not altered by either of the defendants at this polling place. Ordinarily, a litigant is bound by the testimony of his own witnesses, especially if that testimony is uncontradicted and there is no claim of mistake. Wiget v.

Becker (C. C. A. 8), 84 F. 2d 706; Gold v. United States (C. C. A. 8), 36 F. 2d 16; Yellow Cab Co. v. Rodgers (C. C. A. 3), 61 F. 2d 729; Jacobson v. Hahn (C. C. A. 2), 88 F. 2d 433, 435."

The rule that the litigant is bound by the testimony of his own witnesses, especially if their testimony is uncontradicted and there is no claim of mistake, is not challenged anywhere by petitioner. As the citations of authorities in the **Cartello** case indicate, this rule has been consistently followed in the 8th Circuit. See also **Heard v. United States** (1919), 255 F. 829, 832. It is not only the rule of the 8th Circuit but it is also recognized by the 2nd Circuit, **Jacobson v. Hahn et al.** (1937), 88 F. 2d 433, by the 3rd Circuit, **Yellow Cab Co. of Philadelphia v. Rodgers** (1932), 61 F. 2d 729, and, seemingly, by the 5th Circuit in **Young v. United States** (1938), 97 F. 2d 200, 202, reh. den. 97 F. 2d 1023.

Furthermore, as the Appellate Court pointed out, "Inferences which are contrary to established facts may not be drawn from mere conjecture and an unwillingness to believe the unimpeached and uncontradicted testimony of witnesses" (R. 659-660; 178 F. 2d, l. c. 370).

This rule has been followed by the 8th Circuit for a long time. See, e. g., **Ezzard v. United States** (1925), 7 F. 2d 808, 811. In agreement is the 5th Circuit. Thus, in **Texas Co. v. Hood et al.** (C. C. A. 5, 1947), 161 F. 2d 618, 620, cert. den. 332 U. S. 829, 92 L. Ed. 403, 68 S. Ct. 206, the Court quotes with approval its prior decision in **Arnall Mills v. Smallwood** (1933), 68 F. 2d 57, 59, as follows:

> "Although the circumstances may support the inference of a fact, if it is shown by direct unimpeached, uncontradicted, and reasonable testimony which is consistent with the circumstances that the fact does not exist, no lawful finding can be made of its existence."

The rule has been applied also by this Court. In **Pennsylvania R. R. Co. v. Chamberlain** (1933), 288 U. S. 353, 340-1, 77 L. Ed. 819, 823, 53 S. Ct. 391, it is stated:

> "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist."

This conclusion is supported by a long list of precedents which are recited in the opinion. It was followed by an impressive series of decisions.* The fact that these are civil cases does not detract in any way from their authority as precedents in a criminal case. Rather a fortiori, the rule should apply to a criminal proceeding where the rules of evidence are more strictly applied against the prosecution, recognizing the presumption of innocence in favor of the defendant.

These authorities fully warrant the conclusion of the Appellate Court that the testimony of Gee and Wasser,

> "forms no basis for a legitimate inference of the making of or participation in any sort of a conspiracy for the fixing of prices" (R. 659, 178 F. 2d, l. c. 370).

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* See, e. g., **Foran et al. v. Commissioner** (C. C. A. 5, 1948), 165 F. 2d 705, 707; **Tatt v. Commissioner** (C. C. A. 5, 1948), 166 F. 2d 697, 699; **Howell Turpentine Co. v. Commissioner** (C. C. A. 5, 1947), 162 F. 2d 319, 325, and **Winn v. Consolidated Coach Corp.** (C. C. A. 6, 1933), 65 F. 2d 256, 257.

III.

The Appellate Court Properly Held That the Judgment of the District Court Should Be Reversed Because of Prejudicial Evidence Received Over Objections of Respondent, and the District Court Erred in Not Striking That Evidence From the Record.

Petitioner assigns as error the holding of the Appellate Court that a new trial was required by the admission in evidence of certain prejudicial evidence showing (A) foreign control of respondent, and (B) the compensation paid to certain individual defendants (Petition, p. 8, number 6, and pp. 19-21).

A. The District Court admitted, over the objection of respondent (R. 79-80) the portion of government's Exhibit 3, which shows that all of the stock of respondent is owned by the National Dairy Products Corporation of New York (R. 80-1). Petitioner argues (Petition, p. 19) that the admission of that evidence was not prejudicial for the reason that "The trial court was careful to instruct the jury to disregard extraneous matters in reaching its verdict with respect to the corporate defendants (R. 607, 614)." The generic instructions given by the trial court at the cited pages of the record are in no way sufficient to erase from the record the evidence objected to by this respondent. Since the Court is the judge of the materiality and relevancy of the evidence, the jury may well take the instructions to disregard "extraneous matters" as meaning evidence which had not been admitted at the trial.

Petitioner apparently admits that the evidence it succeeded in introducing over respondent's objections was immaterial. That much being conceded, it is also clear that the evidence was prejudicial in that it pointed out

to the jury that respondent was a wholly owned subsidiary of a **foreign corporation.** The appellate court well knew, and was entitled to take judicial notice of, the fact that the case at bar had been tried extensively in the newspapers in advance of the trial below, and sensationally during the proceedings in court. Charges, countercharges, investigations by private and public groups and agencies had aroused public opinion, and the emphasis on the foreign character of the corporation which is in complete financial control of respondent was bound to and beyond a shadow of doubt did prejudice the jury. On the strength of the ruling of the trial court, the government's attorney in his closing argument was able to direct the jury's mind and emotions to that fact:

> "* * * there is no evidence, but I presume they [sic] were dividends paid to the **National Dairy Corporation**" (R. 581). (Our emphasis.)

Under similar circumstances the admission of such evidence was held prejudicial error. Thus, in Union Electric Light & Power Co. v. Snyder Estate Co. et al. (C. C. A. 8, 1933), 65 F. 2d 297, the defendant's counsel propounded questions relative to the ownership of the stock of plaintiff. The Court held that the admission of that evidence was prejudicial error, saying, l. c. pp. 302-303:

> "This cross-examination impressed upon the jury the size and extent of the holdings of plaintiff, the foreign character of the controlling factors of plaintiff, and that the ownership of substantially all the stock of plaintiff was in the North American Edison Company. * * *
>
> "These extraneous facts, if they are facts, served only to arouse the prejudice of the jury. * * *
>
> "This evidence not only took the jury far from the simple issue to be tried, but it distracted their attention from that issue, and brought before them the

size and wealth of plaintiff and its affiliates, and the above-quoted argument of defendant's counsel was calculated to keep fresh in the minds of the jury the size and wealth and foreign character of the plaintiff."

In the **Union Electric** case, the Court pointed out "the evidence was not overlooked in the counsel's argument to the jury" (l. c., p. 303). The same situation is present here, and it is earnestly submitted that the ruling of this Court in that case is controlling in the case at bar.

The case of **United States v. Socony-Vacuum Oil Co.** (1940), 310 U. S. 150, 239-243, relied upon by Petitioner (Petition, p. 20), is not in point here, for the reason that, as it appears from the opinion, the assignment of errors in that case was concerned with the argument to the jury by government counsel (310 U. S., l. c. 237), rather than with the ruling of the trial court in admitting the evidence. Moreover, in that case this Court emphasized the length of the trial, and specifically admonished: "But each case necessarily turns on its own facts" (l. c. 240).

B. In the course of the trial, counsel for the government laid great emphasis on the salaries paid to the Kerckhoff brothers, a highly prejudicial matter, which was bound to arouse the jury. The first attempt by counsel for the government was overruled by the District Court, but the message had already been conveyed to the jury in the question propounded by the government's attorney:

"Q. For instance, are you familiar with the salaries that are paid to each of these five Kerckhoffs? • • • You know they are paid, outside of bonuses—each is paid $3,000 a month, don't you?" (R. 233.)

At the second attempt by counsel for the government, the District Court overruled the objection of respondent's

counsel based on the grounds of prejudice and allowed evidence of the compensation paid to the Kerckhoffs (R. 539-541). At the close of all the evidence, respondent moved the Court to strike out, and instruct the jury to disregard, that evidence, but the District Court overruled the motion (R. 569).

True enough, the trial court instructed the jury not to be influenced by the salaries paid to certain officers of the dairies (R. 622-3), but since the Court had refused to order that evidence stricken and had overruled respondent's motion to that effect (R. 569) it is clear that a prejudicial error was committed. The inconsistent attitude of the District Court cannot be deemed to have been ignored by the jury. The present situation is therefore quite a little stronger than that in **O'Hara v. Lamb Construction Co.** (Mo. App., 1917), 197 S. W. 163, 165, where the Court said:

> "The red hot iron of prejudice has been thrust into the case; merely withdrawing it still leaves a festering wound."

The point was promptly capitalized and fully exploited by the government's attorney, who in his closing argument called the jury's attention to those salaries and bonuses:

> "These salaries of officers * * *" (R. 581).

Obviously what salaries Pevely Dairy pays or did pay its officers is a matter confined to its own business and management policy, but the "red hot iron of prejudice" was injected in the case to the irreparable detriment of this respondent.

Petitioner argues that "the only possible prejudice would have been to the individuals whose salaries were shown, all of whom were acquitted" (Petition, p. 21). Yet Petitioner pointed out also that "Some of the reasons

which may lead a jury to refuse to convict individuals are obvious. In the present case * * * there was a strong plea to the jury by counsel'' (Petition, p. 17, note 12). The theory of the government is apparently that the jury's verdicts—so obviously inconsistent in acquitting the individuals who fixed the prices for which the corporations were convicted—constituted a compromise. That theory is quite tenable, but it clearly points out the danger and prejudice resulting to all defendants from the admissions of immaterial prejudicial evidence. The mental and emotional processes of the jury are beyond the realm of investigation and judicial review, but, unless we are to ignore all realistic considerations, the conclusion is inescapable that the testimony of the Kerckhoffs' salaries and bonuses was highly prejudicial and ought to have been stricken from the record. The ruling of the District Court was error and the Appellate Court was fully warranted in so holding.

C. The District Court erred in admitting evidence covering the profits of the entire Milk Division of respondent, which includes products not involved in the case, and in overruling respondent's motion to strike that evidence from the record.

The trial court, over objections of respondent, admitted evidence of the profits of the whole Milk Division of the company (R. 324-329, 398-400). This division includes more than a dozen different products (R. 326-327, 379-380), whereas this case is confined to only one of those many kinds of milk products, namely, **Grade A regular**. At the close of the defendants' evidence counsel for the government offered Exhibits 43 and 44, containing the operating profit and loss statements for the whole Milk Division of St. Louis Dairy Company for the years 1946 and 1947 (R. 566). On objection by respondent the District Court ruled that those exhibits were inadmissible, remarking that the

government had failed in its purported purpose of using those exhibits on cross-examination of respondent's officers to impeach the accounting and cost allocation system used by the dairy (R. 567). Nevertheless the Court refused to instruct the jury to disregard the testimony previously read from those same exhibits, stating:

> "The Court will leave the record as it is" (R. 567).

Fortified by that ruling, counsel for the government closed his argument to the jury with an emphatic reference to the $317,383.76 profit shown by respondent Pevely Dairy Company on fluid milk during the period July, 1946, to January, 1948 (R. 583). That evidence was prejudicial and the ruling of the trial court refusing to strike that evidence from the record is a reversible error.

The government limited its charges to Grade A regular milk alone* and should be confined in its proof to the allegations of the indictment and bill of particulars together with its two supplements.

In a recent textbook by Housel and Walker "Defending and Prosecuting Federal Criminal Cases" (2nd Ed., 1947), p. 450, it is said:

> "Evidence offered by the government at the trial is limited by and must not conflict with the bill of particulars; if it does, on objection duly and seasonably made, its admission will be refused."

Thus, in **Braatelien et al. v. United States** (C. C. A. 8, 1945), 147 F. 2d 888, 892, the Court stated:

> "When the facts are detailed in a bill of particulars, he who furnishes it will be confined by the court

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* Prices and dates set forth in paragraph 13 of the Indictment, R. 8-9; Bill of Particulars, paragraph IV, R. 22; Second Supplemental Bill of Particulars, paragraph I, R. 62; Government's Exhibit 29, R. 241; and closing argument of government's counsel, R. 602.

to the proof of the facts so specified (citing authorities).”†

In the case at ba , not only was the government limited by its pleadings to Grade A regular milk alone, but the injection of evide ce concerning the aggregate profits made by responden on many other kinds of milk and on the other products old by its Milk Division was obviously prejudicial. It pres nted an extraneous and psychological issue, highly detrim ental to the rights of respondent.

Profits made by espondent, e. g., on orange juice (one of the many produc s sold by its Milk Division, R. 380), certainly have no b aring on the issue of whether or not respondent conspire l to fix prices of Grade A regular milk. Evidence of p ofits unrelated to the product in issue is as inadmissible a any other evidence of the wealth of a defendant. The ru e was stated on many occasions, that

> “To permit e idence of the wealth of a party litigant * * * is pr judicial error.” **Union Electric Light & Power Co. v. Snyder Estate Co.**, supra, l. c. p. 303.

The theory adva ced by the government counsel as qualifying this line f inquiry was that he was entitled to test the accuracy of the cost accounting allocations. But having elicited the information on this promise he left the subject and nev r again reverted to it (R. 324, 325, 567).

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† In accord: **Commonw alth v. Giles, 1 Gray (Mass.) 466; Kettenbach v. United States (C. C. Adams Express Co. (D. C. 9, 1913), 202 F. 377, 383; United States v. Gouled (D. C. N. Y., 191 Iowa, 1902), 119 F. 240, 242; United States v. N. Y., 1917), 245 F. 888, 8 , 253 F. 239; United States v. Pierce (D. C.).**

IV.

The Appellate Court Did Not Hold, as Suggested by Petitioner, That (A) the Statute of Limitations Applied to the Case at Bar, Nor That (B) the Jury's Verdicts of Conviction Were Discredited by the Verdicts of Acquittal.

A. Petitioner asserts that the Appellate Court was laboring under a misconception of law concerning the applicability of the statute of limitation to the case at bar (Petition, p. 18). A reading of the opinion shows the error of the government. The Court below did neither hold nor suggest that the three-year statute of limitation applies here. The Court remarked that the O. P. A. controls from 1943 to 1946 did break the continuity of the conspiracy which is pleaded in the indictment as covering a ten-year period. The Court went on to suggest that anything which transpired during the first period, "if charged as separate offense," would ordinarily be barred by the three-year statute of limitations (R. 660-1, 178 F. 2d, l. c. 370). This argumentative remark of the Court is clearly in the nature of an **obiter** and could be carved out of the opinion without in any way detracting from its logic, coherence or integrity. Petitioner does violence to the unequivocal language of the opinion in stating that the Appellate Court "assumed that the usual three-year statute of limitation would bar conviction of charges based upon the evidence of the price conferences (all of which occurred during or before 1941)" (Petition, p. 18).

Moreover, the whole paragraph of the Court's opinion discussing the two separate periods of the conspiracy was in the nature of dictum as was irrefutably indicated by its beginning with the words "in passing". That expression clearly indicates that the Court was going by, beyond

or departing* from the major issue before it, namely, whether there was any substantial evidence to support respondent's conviction. "In passing" introduces parenthetic or incidental considerations which by no stretch of the imagination can be considered essential to the rationale of the decision.

The rule is well established that general expressions in an opinion which are not essential to dispose of the case are merely dicta: **Watson v. St. Louis, I. M. & S. R. R. Co.** (C. C. Ark., 1909), 169 F. 942, 945, aff. 223 U. S. 745, 56 L. Ed. 639, 32 S. Ct. 533; **Coen v. American Surety Co. of N. Y.** (C. C. A. 8, 1941), 120 F. 2d 393, 400, cert. den. 314 U. S. 667, 86 L. Ed. 534, 62 S. Ct. 128; **People v. Altice Case** (1922), 222 Mich. 379, 190 N. W. 289.

B. Analogous considerations apply to the other contention of Petitioner that the Appellate Court erred in treating "the jury's verdicts of conviction as discredited by the verdicts of acquittal of other defendants" (Petition p. 16; also 2-3 and 17). In the first place, the passage of the opinion in question here was prefaced by the parenthetical limitation "In passing" as to which the foregoing principle applies. Secondly, the Appellate Court recognized the controlling rule that

> "It is true the question on review is not whether the verdict of acquittal of the individual defendants was warranted, but whether the verdict of guilty against the corporations is sustained by substantial evidence, and mere inconsistency in verdicts is not fatal" (R. 661, 178 F. 2d, l. c. 370-1).

This is as clear a phrasing of the rule announced by this Court and apparently contended for by Petitioner (Petition, p. 17) as possible. The Appellate Court merely noted

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* Webster's New International Dictionary, p. 1577: **Passing**, going by, beyond, through or away; departing.

that the inconsistency of the verdicts runs against all "logic or reason." Not even Petitioner could take issue with such a self-evident truth. The Court's remark and related comments, while illuminating, were obviously unnecessary to the holding, and therefore unimportant here.

In conclusion, it is respectfully urged that the petition for writ of certiorari to the court below be denied.

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